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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL
	)	50-323 OL
(Diablo Canyon Nuclear Power Plant	)	
Units 1 and 2)	)	

NRC STAFF'S ANSWER TO JOINT
INTERVENORS' APPLICATION FOR A STAY

Lawrence J. Chandler
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JOINT INTERVENORS' APPLICATION FOR A STAY

I. INTRODUCTION

On July 25, 1984, Joint Intervenors, in anticipation of a vote on the issuance of a full power license for Diablo Canyon Unit 1 on July 30, 1984, filed an Application for a Stay (Application) with the Nuclear Regulatory Commission,[1/] pursuant to 10 C.F.R. § 2.788. Joint Intervenors seek an order staying the effectiveness of the Atomic Safety and Licensing Board's Initial Decision of August 31, 1982, LBP-82-70 and of the issuance of the full power operating license authorized by the Initial Decision in the event the Commission authorizes full power operation (Application at 1).

For reasons which follow, the NRC staff (Staff) opposes the Application and urges that it be denied.

II. BACKGROUND

On August 31, 1982, following an evidentiary hearing the Atomic Safety and Licensing Board, issued an Initial Decision, LBP-82-70, 16 NRC 756

1/ The same Application for a Stay was also filed on July 25, 1984 with the Atomic Safety and Licensing Appeal Board. On July 27, 1984, the Appeal Board issued an Order referring the Application to the Commission.

(1982), as clarified, LBP-82-85, 16 NRC 1187 (1982), authorizing the issuance of full power operating licenses for Diablo Canyon Units 1 and 2 subject to a number of conditions. Appeals of that decision were filed by all parties. The appeals taken by the Staff and Pacific Gas and Electric Company (PG&E) were favorably ruled upon by the Atomic Safety and Licensing Appeal Board. ALAB-776 (June 29, 1984; vacating the condition requiring formal findings by FEMA on the State of California emergency plan pursuant to 44 C.F.R. Part 350). The appeals taken by Joint Intervenors and the Governor are still pending. All conditions precedent to the issuance of full power operating licenses imposed by the Licensing Board have been satisfied by virtue of subsequent findings issued by the Federal Emergency Management Agency (FEMA) and the decision of the Appeal Board in ALAB-776 concluding that a final finding by FEMA pursuant to 44 C.F.R. Part 350 is not required; a petition for Commission review of this decision is now pending.[2/] Thus, subject to a favorable decision by the Commission upon the conclusion of its immediate effectiveness review pursuant to 10 C.F.R. § 2.764(f)(2), a full power operating license may be issued for Diablo Canyon Unit 1.[3/]

2/ FEMA has recently issued interim findings on the State plan finding it to be adequate overall, thus substantively satisfying the Licensing Board's condition in any event.

3/ In brief, a low-power operating license for Unit 1, No. DPR-76, was issued on September 22, 1981 following an immediate effectiveness review by the Commission on September 21, 1981, CLI-81-22, 14 NRC 598 (1981). The authority to conduct activities under this license was suspended by the Commission on November 19, 1981, CLI-81-30, 14 NRC 950 (1981), following the discovery of design quality assurance problems. On April 13, 1984, this license was fully reinstated, CLI-84-5. See also CLI-83-27, 18 NRC 1146 (1983) and CLI-84-2, 19 NRC 3 (1984). A license authorizing fuel loading and low power testing up to 5% of rated power for Unit 2 has not yet issued and is subject to further action by the Appeal Board in accordance with ALAB-763, petitions for review pending, and by the the Staff.

III. DISCUSSION

The requirements pertinent to issuance of a stay, 10 C.F.R. § 2.788(e) are not in dispute, see, Application at 2, n.1, and need not be restated herein. In determining whether the movant has satisfied the four factors set forth in 10 C.F.R. § 2.788(e), it must be recognized that:

> The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak.

Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981; footnotes omitted); see also, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977). By any measure, Joint Intervenors have failed to sustain their burden.

A. With respect to the first factor, likelihood of prevailing on the merits, Joint Intervenors' advance six issues on which they contend they are likely to prevail (Application at 2-8). Notably, of these six, only four have been ruled upon previously in an adjudicatory forum - item 1 (Class Nine Accident Analysis), item 2 (Earthquake Emergency Preparedness), item 4 (FEMA Finding on State Emergency Plan), and item 6 (Quality Assurance). The issue presented by item 3 (Operator Training and Experience) has not been considered by any lower Board, although it has been addressed by the Commission in its Memorandum and Order fully reinstating the Unit 1 operating license, CLI-84-5, April 13, 1984. Item 5 (Seismic Safety) is the subject of a Motion to reopen the record now pending before the Appeal

Board. The Staff submits that Joint Intervenors have not shown a likelihood of prevailing on any of these matters.

As concerns item 1 (Class Nine Accident Analysis), Joint Intervenors argue once more that the Commission improperly limited its "Statement of Interim Policy; Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40101, to prospective application absent "special circumstances" and that, in any event, it violated even that policy by failing to find that such "special circumstances" exist with respect to Diablo Canyon. (Application at 2-3). Joint Intervenors' position on this issue has been rejected by the Licensing Board, LBP-81-17, 13 NRC 1122 (1981) and the Appeal Board, ALAB-728, 17 NRC 777, 795-796 (1983). Review of ALAB-728 was declined by the Commission, CLI-83-22, 18 NRC 1709 (1983). The Commission has expressed its view supporting the correctness of its action regarding both matters asserted by Joint Intervenors in the context of Joint Intervenors' Petition for Review filed in the U.S. Court of Appeals for the District of Columbia Circuit.[4/] See, Brief for Respondents, June 1984, at 10-14, 23-38. Consequently, Joint Intervenors have failed to establish that they are likely to prevail on the merits of this issue.

In regard to item 2 (Earthquake Emergency Preparedness), Joint Intervenors again argue that, notwithstanding the Commission's decision in Southern California Edison Company, et al. (San Onofre Nuclear Generating

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4/ San Luis Obispo Mothers for Peace, et al. v. NRC, Nos. 81-2035, 84-1042; George Deukmejian, Governor of the State of California v. NRC, No. 81-2034. Although the matters currently before the Court of Appeals relate to agency actions concerning low power, the references cited appear equally applicable to the issues placed before the Commission by the subject Application.

Station, Units 2 and 3), CLI-81-33, 14 NRC 1091 (1981), the failure to consider the complicating effects of earthquakes on emergency preparedness precludes a determination that "adequate protective measures can and will be taken in the event of a radiological emergency" as required by 10 C.F.R. § 50.47(a), and that, as a consequence, their right to a hearing "guaranteed by § 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)" was violated. (Application at 4).

As with item 1 above, this argument has previously been rejected by the Licensing Board, Memorandum and Order, December 23, 1981 (unpublished) and by the Appeal Board, ALAB-728, 17 NRC at 792-793 (1983). As noted earlier, the Commission declined review of the Appeal Board's decision in CLI-83-32. While satisfied that, in the context of low power operation, this issue was not significant, CLI-84-4, April 3, 1984,[5/] the Commission nonetheless determined to revisit the issue in this proceeding in connection with full power operation. (Id.) In spite of the fact that this matter is yet to be resolved by the Commission, there is no basis to assume that Joint Intervenors are likely to prevail.

Item 3 (Operator Training and Experience) is a matter not previously adjudicated in this proceeding. Nevertheless, the matter was addressed by the Commission in CLI-84-5, April 13, 1984, the Commission concluding that the operators at Diablo Canyon are suitably trained and experienced and have satisfied the requirements of 10 C.F.R. § 55.25(b). (Slip op.

5/ In this Order, the Commission solicited the views of the parties on whether this matter should be considered in the licensing proceeding, either as a requirement of the Commission's regulations or on the basis of "special circumstances".

at 11-12). See also Brief for Respondents at 38-44. Thus, in regard to this item as well, Joint Intervenors have not shown a likelihood of prevailing.

In item 4 (FEMA Finding on State Emergency Plan), Joint Intervenors assert that 10 C.F.R. § 50.47(a) has not been complied with in light of the absence of "detailed findings" by FEMA on the State of California Emergency Response Plan, a matter required by the Licensing Board in its Initial Decision. (Application at 5-6). This argument is simply a restatement of their position as expressed in their Petition for Review of ALAB-776, now pending before the Commission. For reasons presented in the Staff's Answer to this Petition, filed on August 1, 1984, which are equally pertinent to the subject Application, Joint Intervenors have not shown a likelihood of prevailing on the merits of this matter.

Item 5 (Seismic Safety) is predicated on a Motion filed with the Appeal Board on July 16, 1984 in which Joint Intervenors contend that, based on recent information, several findings made by the Appeal Board in ALAB-644, 13 NRC 903 (1981) are erroneous. Although the Motion is currently pending before the Appeal Board, the Staff, in its Answer to the Motion filed on August 1, 1984, has argued that the Appeal Board is without jurisdiction to entertain the Motion based on the decisions in Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707-709 (1979) and Public Service Company of New Hampshire et al. (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978).[6/] Moreover, the Staff has argued that, in any event, none of the matters presented in the Motion would substantively affect the Appeal Board's decision in ALAB-644.

6/ The matter could be referred to the Staff for consideration pursuant to 10 C.F.R. § 2.206.

Thus, independent of the jurisdictional bar, Joint Intervenors have not shown a likelihood of prevailing on the merits of this issue; in any event, the mere filing of a motion does not establish any likelihood of prevailing on the merits.

Finally, in Item 6 (Quality Assurance) Joint Intervenors argue that, based on the several pending petitions for review filed pursuant to 10 C.F.R. § 2.786 regarding ALAB-756, ALAB-763 and ALAB-775, the Appeal Board's resolution of a variety of quality assurance matters has been erroneous (Application at 6-8). The Staff has responded to each of the foregoing petitions for review, supporting the correctness of the respective Appeal Board decisions. Joint Intervenors have added nothing to their Application to establish that they are likely to prevail on these matters before the Commission; the pendancy of these Petitions in and of itself does not establish a likelihood of prevailing on the merits.

In summary, Joint Intervenors have not satisfied the first factor of 10 C.F.R. § 2.788(e).

B. Joint Intervenors next argue, with respect to the second and most crucial factor, Farley, supra, that they will be irreparably injured if a full power license is issued. In part, their argument is based on the appended affidavit of Dale G. Bridenbaugh (which in turn appends an August 11, 1981 affidavit executed by Dale G. Bridenbaugh and Richard B. Hubbard).

To the extent the Application relies on the foregoing affidavits, it fails to establish that irreparable injury will result. The August 11, 1981 affidavit addresses the potential for injury resulting from low power (up to 5%) operation. These views were generally rejected by the Commission

in CLI-84-1, 19 NRC 1 (1984) and again in CLI-84-5, slip op at 16-17; see also, Respondent U.S. Nuclear Regulatory Commission's Opposition to Emergency Motion For Stay,[7/] April 17, 1984 at 44-49.

In connection with the issuance of a full power operation license, Mr. Bridenbaugh's more recent affidavit, without elaboration, merely concludes:

> The granting of such full power approval is potentially hazardous and needs to be carefully considered. The risks outlined in the above paragraphs [11 and 12] of the 8/11/81 affidavit are still present and would be increased by a significant factor by operation at full power. It is therefore of even greater importance that the plant has been adequately designed and constructed and that PG&E is properly qualified to operate it than was the case for low power operation. Accordingly, the risks described in paragraphs 11 and 12 of the 8/11/81 affidavit continue to be of concern.

The affidavits relied upon present no more than speculation, implying that deficiencies could result in a nuclear accident. Such superficial basis has been rejected, in this very proceeding, as an adequate showing of injury. CLI-84-5 at 17.

Joint Intervenors also argue that, as a consequence of the Commission's failure to address Class 9 Accidents, NEPA has not yet been fully complied with and until such time as this has been accomplished, injunctive relief is warranted. In light of the above discussion regarding this issue, it is clear that the Commission is satisfied that NEPA has been fully complied with and, consequently, Joint Intervenors have shown no harm in this regard. See also, Respondent U.S. Nuclear Regulatory Commission's Opposition to Emergency Motion for Stay, April 17, 1984 at 49-51.

7/ See n.4, supra.

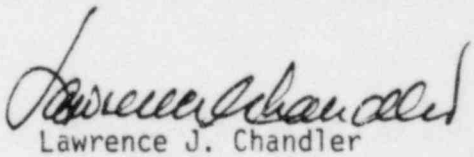
C. In connection with the third factor under 10 C.F.R. § 2.788(e), harm to other parties, Joint Intervenors, while recognizing a potential harm to PG&E, suggest that it is merely de minimis. Given that Joint Intervenors have wholly failed to satisfy the first two factors for issuance of a stay, even a harm which might be de minimis does not warrant the relief requested.

D. The fourth factor, where the public interest lies, similarly does not favor the issuance of a stay. Where, as here, there has been a failure to satisfy the first two factors, most significantly in light of the failure to present a significant safety issue, the public interest does not favor issuance of a stay. Southern California Edison Company et al. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 692 (1982).

IV. CONCLUSION

For the foregoing reasons, Joint Intervenors have failed to satisfy the requirements of 10 C.F.R. § 2.788 and thus their Application for a Stay should be denied.

Respectfully submitted,



Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 1st day of August, 1984.